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No. 92-1371

Supreme Court, U.S.
FILED
FEB 1 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF ARIZONA,

Petitioner,

-vs-

RONALD SWANSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After a motorist consents to the search of his car, do the police violate the Fourth Amendment of the United States Constitution by removing the inside door panels of the car when the police reasonably believe that the motorist is involved in drug dealing and that incriminating evidence will be found behind the door panels? Does the motorist's consent always include looking behind the door panels, does it include looking behind the door panels only if the panels appear to have been tampered with, or must the police have probable cause to look behind the panels?

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OPINION BELOW

The Arizona Court of Appeals reversed Respondent Swanson's convictions for possession of cocaine for sale and transportation of cocaine because Petitioner's consent to search the vehicle did not extend to "popping" the door panels. The court also rejected the State's argument that the officers had probable cause to remove the panels because, inter alia, the screws holding the panels appeared to have been tampered with. The opinion is appended here as Appendix A.

STATEMENT OF JURISDICTION

The opinion of the Arizona Court of Appeals that the State asks this Court to review was filed on April 14, 1992. (Appendix A.) The Arizona Supreme Court denied the State's petition for review on November 3, 1992, with Justice Martone voting to grant the petition. (Appendix B.) This petition is filed within 90 days from that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

At 10:30 a.m. on November 8, 1990, Arizona Department of Public Safety Officers stopped Respondent and a codefendant as they were driving eastbound on Interstate 40 in the area of Holbrook, Arizona. At the time the officers first noticed Respondent's car, they were stationary, with their patrol car facing west. Officer Rush was the first to see Respondent's car. He noticed that the car was traveling in the passing lane and appeared to be speeding. The officers then began to follow Respondent's car in their patrol car. They drove through a median crossing onto the eastbound lanes and followed Respondent's car east.

Officer Hash testified that Respondent was not speeding during the time that the officers followed Respondent's car. However, the officers observed Respondent's car change lanes without

using a turn signal. Respondent later admitted in his testimony that he changed lanes without signalling even though his car was equipped with a functioning turn signal. Upon seeing the improper lane change, Officer Hash turned on the emergency lights and pulled Respondent's car over. Officer Hash then got out of the police car and approached Respondent's car on the driver's side.

Officer Hash asked Respondent, who was the driver, for his driver's license and the vehicle registration. Respondent provided his license and car rental papers. Hash was able to see that the car contained a radar detector, a citizen's band radio, several pagers, and a cellular telephone. Officer Hash testified that, at the time he effectuated the stop, he knew that the car had California license plates. However, it was not until after he made the stop that he became aware of the race

of the car's occupants or that the car was rented. Hash was aware, from his training, that Interstate 40 was being used "as a major thoroughfare" to funnel drugs from Los Angeles to the East, and that frequently the drugs are transported in rental cars carrying cellular telephones, pagers, and other electronic equipment.

At Officer Hash's request, Respondent got out of his car and accompanied him back to the police car. Respondent remained with Officer Hash at the police car for 5 to 7 minutes. During this time Officer Hash explained why he had stopped Respondent's car and wrote a warning. Officer Hash testified that he does not issue citations for failing to signal intent before changing lanes; instead, his practice is to issue written warnings.

At some point during the discussion, Respondent told Hash that he was traveling from Los Angeles to New York

for a family reunion. After giving the written warning to Respondent, Officer Hash asked Respondent if he had any guns, large sums of money, or drugs in the car. Respondent answered in the negative.

Officer Rush then handed Respondent a copy of a consent form and indicated that he wanted Respondent's consent to search Respondent's car. Respondent refused to sign the consent form, but verbally indicated that the police could search his car. The consent form informed Respondent that he had the right to refuse to consent to the search of his car. Respondent testified that he did not "really read" the consent form; however, he conceded that Officer Rush read it aloud to him. Respondent testified that neither Officer Hash nor Officer Rush threatened or coerced him to obtain his consent to search his car, and that neither had a weapon drawn. Prior to his discussion with Respondent about

searching the car, Officer Rush had activated the tape recorder in his shirt pocket. Portions of the tape were inaudible. However, after listening repeatedly to the tape, the trial court found that the State had met its burden of establishing that Respondent voluntarily consented to the search of the car.

Officers Hash and Rush together searched Respondent's car. During this time, Sergeant Lane, who had subsequently arrived, stood with Respondent and his passenger, codefendant Davis, approximately 25 feet from Respondent's car. Officer Hash testified that Respondent was free to leave during this period. Sergeant Lane testified that Respondent and his passenger appeared calm, open, and friendly while he stood with them during the search. Indeed, he and Davis discussed their respective families and showed each other pictures

of their children. However, he testified that Respondent and Davis appeared to become nervous when the officers searching the car opened one of the car's rear doors. Nevertheless, neither indicated at any time that they wanted the search to end.

The officers found a suitcase in the trunk that contained butterfly knives. During the search, Officer Rush noted that the screws on the door panels had been tampered with. He informed Officer Hash of this. Officer Hash removed the rear door panels with a tool known as a slim jim. Inside the left rear door, he discovered what he recognized to be 6 kilograms of cocaine; in the right rear door he discovered six plastic bottles containing vitamin super B. Cocaine users sometimes mix vitamin super B with cocaine.

The officers arrested Respondent and his companion. The entire encounter,

from the time of the initial stop until Respondent's arrest, lasted approximately 45 minutes.

REASONS FOR GRANTING THE WRIT

The standard for determining the scope of a person's consent to the police to search his property is that of objective reasonableness. Florida v. Jimeno, ___ U.S. ___, 111 S. Ct. 1801, 1804 (1991) (consent to search car extended to paper bag on car's floor). Thus, the permissible scope of a vehicle search is limited to what a reasonable person would expect the scope of the search to be. The transportation of illicit drugs behind vehicle door panels is such a common occurrence that it has spawned cases in various jurisdictions regarding the scope of a driver's consent to search the vehicle. These "door panel" cases have not taken a uniform approach and Jimeno does not speak to the removal of such door panels or any other car parts.

Some courts uphold removal of door panels without requiring any indication that the doors had been tampered with. United States v. Blanco, 844 F.2d 344, 348 (6th Cir), cert. denied, 486 U.S. 1046 (1988) (scope of consent not exceeded where defendant complained agents proceeded to "pull the car apart"); United States v. Torres, 663 F.2d 1019, 1026-27 (10th Cir. 1981), cert. denied, 456 U.S. 973, 102 S. Ct. 2237 (1982) (police did not exceed scope of unlimited consent to search car for drugs and other items by removing air vent cover on side of door following observation of money hidden in well of ashtray that was connected to air vent); State v. Valencia Olaya, 105 N.M. 690, 695, 736 P.2d 495, 500 (N.M. App.), cert. denied, 105 N.M. 689, 736 P.2d 494 (1987) (after searching the trunk, asking and receiving permission to search the car interior a second time was evidence of

unlimited consent to remove panels); State v. Santana, 521 A.2d 346, 351-52 (N.J. Super. A.D. 1987) (police did not exceed scope of unlimited consent to search car by removing door panel, although court pointed to no indication that it had been tampered with; consent to search includes all areas that the police could search with a warrant).

Other courts uphold the removal of a door panel as being within the scope of an unlimited consent to search if there is an indication that the door panel had been tampered with. United States v. Pena, 920 F.2d 1509, 1515 (10th Cir. 1990), cert. denied, 111 S. Ct. 2802 (1991) (police did not exceed scope of unlimited consent to search car by removing rear quarter panel vent after tapping on the rear fender produced a thud rather than a hollow sound and a probe of the vent opening indicated presence of solid object); United States

v. Espinoza, 782 F.2d 888, 892-93 (10th Cir. 1986) (police did not exceed scope of unlimited consent to search car for drugs by removing door panel following observation that screws had been tampered with); United States v. Torres, 663 F.2d 1019, 1026-27 (10th Cir. 1981), cert. denied, 456 U.S. 973, 102 S. Ct. 2237 (1982) (police did not exceed scope of unlimited consent to search car for drugs and other items by removing air vent cover on side of door following observation of money hidden in well of ashtray that was connected to air vent); People v. Crenshaw, 9 Cal. App. 4th 1403, 1410, 12 Cal. Rptr. 2d 172, 179 (Cal. App. 1992) (police did not exceed scope of unlimited consent to search car for drugs by unscrewing and removing vent to door post after observing that the screw had been tampered with and search of the door panel survives the Jimeno test of objective reasonableness); Ragin v.

State, 385 S.E.2d 770, 771-72 (Ga. App. 1989) (police did not exceed scope of consent to search car by removing door panels after noticing that the panel screws appeared to be irregular).

The Arizona court ignored these cases and followed the distinctly minority approach set forth in the federal case of United States v. Garcia, 897 F.2d 1413, 1419-20 (7th Cir. 1990) (consent to search truck for drugs does not normally include removal of door panels; upholding removal of door panels as justified by probable cause resulting from visual observation through window slot of packages in the door). Petitioner submits that Garcia's use of a probable cause analysis on top of consent analysis does not survive Jimeno. The Arizona court was incorrect in its opinion at footnote 5 (Appendix A at 16) wherein it stated that a car door panel search could not meet the Jimeno objective

reasonableness test. As noted above, a California court has held exactly the opposite. Crenshaw, 9 Cal. App. 4th at 1409, 12 Cal. Rptr. 2d at 178. Removal of a door panel does meet the objective reasonableness test for a consent search where an officer has asked a driver for permission to search for narcotics. Id; see United States v. Gutierrez-Mederos, 965 F.2d 800, 803 (9th Cir. 1992) (under Jimeno, consent to search for weapons and narcotics included use of key to open side panel compartment inside hatchback and pull away cardboard divider).

The trial court found that Respondent consented to the search of his car and did not find that Respondent imposed any limits on his consent. Therefore, the police were authorized to search wherever

a reasonable person would expect that search to occur.[1]

Respondent's consent should be deemed to include the interior portion of the car where people normally store belongings. Obviously, one who consents to a search of his car would reasonably expect the police to look in the interior where belongings are normally kept. Consent to search one's vehicle would not ordinarily include consent to the removal of the door panels. However, Respondent's consent should be deemed to include consent to investigate suspicious

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1. Petitioner does not abandon its argument that the police had probable cause to look behind the door panel under Garcia. The Tenth Circuit has recently said that an experienced officer noticing a loose door panel had probable cause to believe contraband was hidden there. United States v. Lugo, 978 F.2d 631, 637 (10th Cir. 1992). The probable cause argument in this case included more than just obvious signs of tampering on the door panel screws. However, Petitioner maintains that probable cause is not necessary under the test set forth for consent searches in Jimeno.

circumstances that came to the officers' attention during the course of their search of the interior of the car. Since no reasonable person would expect a police officer to ignore a suspicious circumstance uncovered during the course of a search, consent to search should be deemed to include consent to investigate suspicious circumstances.

During the course of the search of the interior of the car, the officers discovered something that reasonably aroused their suspicions; namely, the fact that the screws of the door panels had been tampered with. People typically do not tamper with the screws of car door panels. This is even more true of rental cars. A renter would have no cause to remove the door panels. The rental company would have every reason to keep the car in a neat condition, and would not be likely to leave passenger compartment panels with loose screws. As

the court of appeals recognized in its opinion, the loose screws justifiably raised the officers' suspicions. (Appendix A at A-28.) A reasonable investigation of the suspicious circumstance of loosened door screws would necessarily include the removal of those screws to see if something had been placed behind the door panel. Respondent's consent should reasonably be interpreted as consent to investigate the matter once that evidence was discovered. Therefore, the removal of the door panels was justified by Respondent's consent to the search of the vehicle.

CONCLUSION

The Arizona Court of Appeals improperly interpreted Jimeno when holding that the search of the car door panels exceeded the scope of Respondent's consent to the search of the vehicle. Respondent could not reasonably expect the officers to ignore the suspicious circumstances uncovered during the search for narcotics. Given the inconsistent analysis of consent searches involving door panels, and given the fact that this familiar hiding place for drugs continues to trigger search cases, this Court should accept this petition and hold that the reasoning in Jimeno applies to the consent search of car door panels. The opinion of the Arizona Court of Appeals should be vacated and remanded with instructions to affirm the trial court's ruling on the suppression motion.

DATED this 1st day of February, 1993.

Respectfully submitted,

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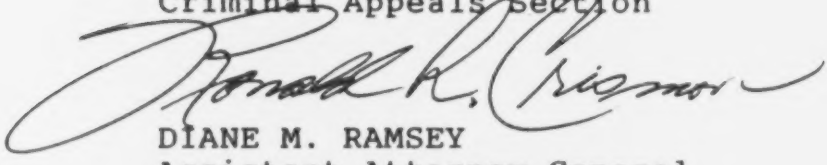

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A P P E N D I C E S

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 90-1404
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	O P I N I O N
	)	
RONALD SWANSON,	)	
	)	
Appellant.	)	
	)	

Appeal from the Superior Court of
Navajo County

Cause No. 89-CR-523

The Honorable Jay Natoli, Judge

REVERSED AND REMANDED

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Chief Counsel, Criminal Division
and Daniel J. Kiley, Assistant
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A. Michael Espino, Navajo County Public Defender
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J A C O B S O N, Judge

Ronald Swanson appeals from his convictions for possession for sale and transportation of cocaine, in violation of A.R.S. § 13-3408(A)(2) and (7), both class 2 felonies. The only issue we need address on appeal is whether the trial court properly denied defendant's motion to suppress evidence obtained as the result of a search of the rental car defendant was driving. We hold that the trial court should have granted the motion to suppress evidence obtained in a search and seizure that exceeded the scope of defendant's consent and was otherwise unsupported by probable cause.

FACTS AND PROCEDURAL HISTORY

On the morning of November 8, 1989, Department of Public Safety Officers Rush and Hash stopped defendant and his passenger as they were driving eastbound on Interstate 40 near Holbrook. The officers were in their patrol car, facing west, when Rush first spotted defendant's

car, which Rush believed was speeding in the passing lane. The officers crossed the median of the interstate, accelerated and followed the car.

Defendant was not speeding when the officers reached his car. However, the officers observed him change lanes without signaling. Officer Hash flashed the emergency lights and immediately pulled defendant over. Hash noticed that defendant's vehicle had California plates and observed a cellular phone, a citizen's band (CB) radio, a radar detector, and several pagers in the car.

Officer Hash asked defendant for his driver's license and the vehicle registration. Defendant produced his driver's license and rental car papers. Defendant then accompanied Hash back to the patrol car, where he remained for five to seven minutes, as Hash explained the reason for the stop and issued a

warning.[1] Defendant told Hash that he was going from Los Angeles to New York for a family reunion.

After giving defendant the warning, Officer Hash asked him if he had any guns, large sums of money, or drugs in the car; defendant said no. Hash then asked defendant to read and sign a consent to search form. Officer Rush also handed defendant a copy of a consent form and asked his consent to search the car. Although the officers asked him five or six times, defendant refused to sign the consent form. Defendant did, however, give verbal permission to the officers to "go in and look."

After defendant acquiesced in the search, Hash took out tools and he and Rush began to search the car. During the

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1. Officer Hash testified that he does not issue citations for failing to signal intent before changing lanes; instead, his practice is to issue written warnings.

search, defendant and his passenger stood with Sergeant Lane, who had also arrived at the scene. Lane testified that defendant and his passenger were calm, open, and friendly during the search. In fact, Lane and defendant's passenger discussed their respective families and showed each other pictures of their children. However, Lane testified that the two men became "nervous" when one of the officers opened the right rear door of the rental car.

During the search, Officer Rush noticed that the screws on the left rear door panel had been tampered with. He testified that they looked "[l]ike someone had taken a screwdriver to them, loosened them up." He informed Hash. Hash, without asking defendant for additional permission, removed the door panel with a tool known as a "slim jim." There he discovered six kilograms of what appeared to be cocaine. Inside the right

rear door the officers found six bottles of vitamin super B.[2] The officers then arrested defendant and his passenger. This entire process between initial stop and arrest took approximately 45 minutes.

Before trial, defendant moved to suppress the state's evidence, arguing that the search of the vehicle was unconstitutional. After a hearing, the court denied the motion and defendant and his passenger were tried. The jury found defendant guilty of possession for sale and transportation of a narcotic drug. See A.R.S. § 13-3408(A)(2) and (7). He was sentenced to concurrent aggravated terms of ten years in prison and fined $150,000. Defendant timely appealed.

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2. At trial, the Department of Public Safety chemist testified that vitamin super B is often mixed with cocaine.

DISCUSSION

Contending that his fourth amendment[3] rights were violated by the search and seizure, defendant on appeal, asserts the following arguments in support of suppression:[4]

1. The search was unconstitutional because it grew out of a pretextual stop;

2. He gave no valid consent to the search; and

3. The search exceeded the scope of consent, if any.

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3. U.S. Const., amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4. Swanson also argues other erros during the trial, which we need not address because of our disposition on the suppression issue.

A. Pretext Stop

In reviewing a motion to supress, this court will consider the facts in the light most favorable to sustaining the trial court's ruling. State v. Acosta, 166 Ariz. 254, 255, 801 P.2d 489, 490 (App. 1990). Defendant first argues that the entire search and seizure was tainted from the start because the officers stopped him merely as a pretext to search for evidence of a more serious crime. He argues that no reasonable police officer would have taken the action the officers took in crossing the median, following, and then pulling him over. We disagree.

Regardless of the officer's underlying motives, a stop is not invalid if there exists a valid, objective reason to make the stop. Id. at 257, 801 P.2d at 492. See also State v. Jeney, 163 Ariz. 293, 296, 787 P.2d 1089, 1092 (App. 1989); United States v. Garcia, 897 F.2d 1413, 1419 (7th Cir. 1990). We have held that

a violation of the traffic laws provides a sufficient objective ground to stop a vehicle. State v. Acosta, 166 Ariz. at 257, 801 P.2d at 492. See also State ex rel. Hyder v. Superior Court, 114 Ariz. 337, 340, 560 P.2d 1244, 1247 (1977). Here, defendant concedes that he committed an improper lane change. The officers therefore had an objectively valid reason to stop defendant. Even if the officers did suspect the two men of more serious crimes -- a fact issue we need not reach -- this did not make the traffic stop unconstitutional. As we stated in Jeney, "[t]he fact that evidence of alleged drug offenses might come to the officers' attention when they effected the arrest does not make the officers' otherwise lawful conduct invalid because of an alleged subjective motivation." 163 Ariz. at 296, 787 P.2d at 1092. The fact that Officers Hash and Rush pulled defendant over for a minor

traffic violation does not taint the stop with unconstitutionality.

B. Consent to Search

Defendant next argues that he gave no consent to search the vehicle. Alternatively, he argues that if any consent was given, it was invalid because it was procured after the stop had exceeded the time reasonably necessary to effectuate the traffic stop.

The trial court's factual determinations on the issue of giving consent will not be overturned unless clearly erroneous. See Acosta, 166 Ariz. at 257, 801 P.2d at 492 ("The validity of consent is determined by considering, in light of all the circumstances, whether the consent was voluntary"). Having reviewed the evidence, including a tape recording that Officer Rush made of his conversation with defendant prior to the search, we conclude that the trial court's determination that defendant

voluntarily consented to the search was not clearly erroneous. We do not reach the issue whether the consent was invalid because it was obtained after an unreasonable duration, because the following discussion reveals the search and seizure were unconstitutional for other reasons.

C. Scope of the Search

Although the trial court concluded that defendant consented to the officers' search of the car, it also concluded that the officers' search exceeded the scope of defendant's consent:

> An unqualified consent to search a vehicle does not give law enforcement officer's [sic] license, absent some further basis, to start ripping or tearing a car apart. This would, in the court's mind, apply to removing door panels.

This holding is factually supported.

It is well established that "the scope of a consent search is limited by the breadth of the actual consent." United States v. Garcia, 897 F.2d 1413, 1419

(7th Cir. 1990). Whether a consensual search remained within the bounds of the actual consent is a question of fact to be determined from the totality of circumstances; the trial court's finding will be affirmed unless clearly erroneous. United States v. Espinosa, 782 F.2d 888, 892 (10th Cir. 1986).

We agree with the trial court that the scope of the officers' search exceeded the breadth of defendant's actual consent in this case. To begin with, a consensual search is limited by the items about which the officer inquired as a predicate to the search. Garcia, supra. Here, similar to Garcia, Officer Hash asked defendant if he had any guns, large sums of money, or drugs in the car. The court in Garcia held that the consent to search the car for similar items did not include searching behind the door panels:

> Without more, police can only search areas these items may reasonably be expected to be found. The opening

> of door panels is not normally included in this set of areas to be searched. Such a search is inherently invasive, and extends beyond the consent given under these circumstances.

897 F.2d at 1419-20.

Prior to asking for consent, Officer Rush activated a tape recorder hidden in his shirt pocket. The recorded conversation reveals that the officers repeatedly informed defendant that the scope of the search they wished him to consent to would involve "taking a look in the car." In explaining the consent form to defendant, the following exchanges took place:

> OFFICER: Okay, what I need you to do is to go ahead and read this and then I need your signature right here.
>
> [DEFENDANT]: What is this?
>
> OFFICER: Basically it is you're giving us consent to take a look in your car. Okay?
>
> [DEFENDANT]: I just don't really want to sign [inaudible].
>
> OFFICER: All right. Okay. Did you read it or do you want me to explain anything to you?

[DEFENDANT]: What it's saying, really.

OFFICER: Basically all it is is you're giving us consent to take a look in the vehicle.

. . .

OFFICER: Okay. What I need is your signature. Want me to do this? Basically like I said, it's you're giving us consent. We'd like to have it on tape or [inaudible].

[DEFENDANT]: You can go in and look.

OFFICER: You don't mind if we look?

[DEFENDANT]: [Inaudible].

OFFICER: You're sure? You don't want to sign it though?

[DEFENDANT]: I don't want to sign it.

OFFICER: Okay. Okay basically what it's saying here, I'll tell you. I have been duly advised of my constitutional rights, and do consent to the search required. I have been duly [inaudible] search warrant obtained for [inaudible].

[DEFENDANT]: [Inaudible].

OFFICER: So basically what it is, you're giving us permission to take a look in the car. Okay? That's all it is. If you don't want to sign it, you know, that's fine.

[DEFENDANT]: You can look.

OFFICER: It is okay if we take a look in the vehicle?

[DEFENDANT]: I can't stop you.

OFFICER: You guys don't mind then?

[DEFENDANT]: [Inaudible].

OFFICER: Like I said all it is, is basically a consent to search.

[DEFENDANT]: If you guys are going to search me, you're going to search.

OFFICER: Are you sure?

[DEFENDANT]: [Inaudible].

We agree with the trial court that consent to "take a look in the vehicle" does not encompass the further intrusion of "tearing a car apart" by removing the door panels. See Garcia, supra. See also State v. Murray, 151 N.J. Super. 300, 376 A.2d 1255 (App. Div. 1977) (officer exceeded permissible scope of search when he "invaded the structural integrity of the vehicle itself" upon finding an empty roach clip and a vial containing traces of marijuana on the

floor of van). The officers' removal of the door panel invaded the structure of the automobile and far exceeded the scope of "taking a look in the car" to look for guns, large sums of money, or drugs.[5] The removal of the door panel was not within the scope of the search to which defendant consented.

D. Probable Cause

The state concedes that, at the time the officers began the search, they lacked probable cause to believe the car contained evidence of criminal activity.

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5. The standard for determining the scope of a suspect's consent is one of objective reasonableness, which is "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, ___ U.S. ___, ___, 111 S. Ct. 1801, 1803-04 (1991). In Jimeno, the Supreme Court held that a general consent to search the car for narcotics included consent to search a paper bag lying on its floor. We do not believe, however, that the typical reasonable person would find that consent to "take a look in the car" for drugs, weapons, or large sums of money included consent to dismantle the car in the process.

The state supports the initial lawfulness of the search solely on the basis of defendant's consent to search. However, because the search exceeded the scope of defendant's consent to search, we must examine whether the added intrusion was justified. The trial court upheld the search based on the state's evidence that the door panel screws had been tampered with and the officers' knowledge that drugs are often concealed behind door panels.[6] The court determined that this gave the officers a "reasonable basis" to search behind the door panel:

> Officer Rush testified the screws on the left rear passenger door panel appeared to have been tampered with. They were loose. He pointed this out to Officer Hash who then proceeded to remove the door panel and find what the officers believed to be narcotics. Officer Rush's

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6. Rush testified that it is "common knowledge in law enforcement" that drugs are often secreted behind car door panels. However, Rush did not relate that "knowledge" to his personal experience.

> observation, coupled with both officers' experience and training that narcotics are often concealed behind a car's door panel, provided a reasonable basis to remove the panels.

(Emphasis added.)

The trial court erred in using "reasonable basis" as the standard to justify the search. In order for a warrantless search to be lawful, it must be supported by probable cause. State v. Richards, 110 Ariz. 290, 291, 518 P.2d 113, 114 (1974). Cf. Acosta, supra (reasonable suspicion to believe car was stolen did not justify officer's search into door panel).

The trial court's failure to apply the correct standard in denying the motion to suppress is not necessarily fatal; this court will affirm the trial court's ruling even if the trial court reached the correct conclusion on incorrect reasoning. State v. Perez, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

Thus, if we were to determine that the officers had probable cause to extend the search into the space behind the door panels, we would uphold the denial of the motion to suppress. However, we find the officers lacked the requisite probable cause.

Probable cause gives an officer the constitutional authority to search areas of the vehicle outside the scope of the suspect's consent. See United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990). Probable cause to search is information sufficient to justify a belief by a reasonable person that an offense has been or is being committed, State v. Richards, supra, and that items connected with that crime will be found in the place the officer proposes to search. State v. Carter, 145 Ariz. 101, 110, 700 P.2d 488, 497 (1985). Although the officer need not have in hand evidence that would suffice to convict,

probable cause cannot rest upon a mere suspicion that a crime has occurred. State v. Hutton, 110 Ariz. 339, 341, 519 P.2d 38, 40 (1974); State v. Howard, 163 Ariz. 47, 50, 785 P.2d 1235, 1238 (App. 1989).

Among the facts justifying a finding of probable cause, the state argues, is the officers' testimony that, although defendant and his passenger appeared calm at the start of the search, they became "nervous" when Officer Rush opened the right rear door. The state contends that a change in a suspect's demeanor can support an inference that there is something incriminating to be found, citing Alicea v. Commonwealth, 410 Mass. 384, 573 N.E.2d 487 (1991). However, that case does not support the proposition that a defendant's nervousness, at the end of a 45-minute traffic stop, provides probable cause to dismantle his car. Nervousness alone is

not enough to establish probable cause for such an intensive search.

Officer Hash testified that defendant was "kind of nervous, or maybe a little bit anxious to move on." He was [j]ust kind of moving around, and more being in a hurry to leave." Sergeant Lane testified that defendant and his passenger were "very polite, very courteous" while talking with him while Rush and Hash searched the car, although "their heads were turned looking at what the officers were doing," and as the officers searched the middle of the car near the rear doors "the conversation changed a little bit in that it was more fragmatic," and "the types of answers were shorter." In the context of a 45-minute wait, standing beside a busy interstate highway, during which the officers were dismantling the interior of the vehicle, we do not find this behavior unusual.

The state also contends that the officers' knowledge of the "habits of drug carriers," including a common practice of hiding drugs in car door panels, contributed to establish probable cause to search beyond the scope of defendant's consent in this case. See, e.g., State v. Brown, 370 So. 2d 547 (La. 1979) (fact that defendant's behavior correlates with elements of drug courier profile may be considered, along with other information known to the officer at the time of the stop). However, the only facts the officers pointed to in this case to establish a "drug courier profile" were that defendant and his passenger were travelling east on an interstate highway with electronic paging equipment and a cellular phone, in a rental car.

At the time of defendant's traffic stop, the officers were participating in the Violator Directive Patrol Program, a

special detail designed to reduce accidents, apprehend fugitives, and recover stolen vehicles. As part of that program, the officers had been instructed to look for vehicles that had telphones, pagers, CBs, or police scanners, travelling east to west on interstate roads, as potential drug couriers, or "mules." Officer Rush testified that his "suspicion that something was wrong" arose in this case because "[y]ou have these guys going to New York in a rental car to a family reunion, and they have all this electronic gear, that just doesn't add up to me, that's suspicious to me." The coordinator of the Violator Directive Patrol Program testified that contraband is often found in rental vehicles travelling from west to east, and the presence of cellular phones, CB radios, "fuzz busters," or pagers, were also often indicia of contraband in a car.

In our opinion, these indicia of a "drug courier profile" do not give rise to expanding a mere suspicion into probable cause. As defendant correctly points out, this description fits any number of other individuals not engaged in criminal activity, and is an insufficient factual basis for probable cause to overcome the fourth amendment's warrant requirement. See, e.g. State v. Houpt, ___ Ariz. ___, 821 P.2d 211 (1991) (defendant's purchase of airline ticket for cash, check of heavy suitcase, and extreme nervousness while awaiting to board flight, did not even constitute reasonable suspicion that defendant was involved in a narcotics transaction). A similar general profile has been criticized as "so vague and inclusive that it would describe virtually every young black person arriving from the West Coast." State v. Matthews, 366 So. 2d 1348 (La. 1978)

(discussing factors of the "Detroit Profile" of suspected narcotics couriers, including that a young black male arrived by plane from the West Coast, acted nervous, and had only one piece of luggage). We find no evidence in this record that the officers' reliance on any "drug courier profile" was information sufficient to establish probable cause that a crime was being committed by this defendant and that items related to that crime would be found where the officers searched. See, e.g., State v. Brown, 370 So. 2d 547, 550 (La. 1979) (courier profile correlation by itself does not provide reasonable cause to detain a suspect, but is admissible at a suppression hearing only "in conjunction with other more particularized information as to the accused's criminal conduct"). Although the profile might arouse the officers' suspicion, mere suspicion does not constitute probable cause.

Finally, the state cites United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990), in support of its position that the evidence the doorscrews had been tampered with provided probable cause to search behind the door panels. In Garcia, probable cause developed during the course of the search to which the defendant had consented. The officers developed suspicions based on apparent tampering with the vehicle's door.

> During the search, [Officer] Baker's suspicions were aroused when he noticed the lack of window cranks and door handles on both doors and mismatched and ill-fitting screws that held the interior door panels in place. Determining this to be suspicious, Baker and Olivero inspected the door panels more closely. While looking through the window slot they observed grey packages wedged inside the door. Based on their visual observations, Baker and Olivero removed the driver's side door panel and found ten packages wrapped in duct tape. The packages were approximately two to three inches thick, twelve inches long, and six inches wide. Baker and Olivero opened one package with a knife and discovered marijuana.

Garcia, 897 F.2d at 1416. The court upheld this warrantless search behind the

door panel, not on the evidence that the door hardware had been tampered with, but on the officers' observations of packages wedged inside the door:

> In this case, however, we believe the dismantling of the doors was justified by probable cause. While conducting the consensual visual search, Baker's suspicions were aroused by the lack of door handles and the mismatched and ill-fitting screws on the door panels. Investigating more closely, Baker spotted packages inside the the door while looking through the window opening. This visual observation established the probable cause for the troopers to extend their search and take apart the door.

Id. at 1420 (emphasis added).

The difference between the facts in Garcia and in this case are readily apparent. There, the officers did not immediately remove the door panel when their suspicions were aroused by evidence of tampering.[7] Rather, they followed

---

7. Contrary to the officers' conduct in Garcia, it is apparently the standard operating procedure of the officers here to "pop" all door panels when permission to search is obtained.

up with further investigation, which was brief and non-intrusive. This further investigation led to the discovery of facts establishing a probable cause to remove the panel and search inside the door. See also Alicea v. Commonwealth, 410 Mass. 384, 573 N.E.2d 487 (1991) (trooper used his flashlight to look down through window casing, and observed partially obscured object at bottom of door frame).

Officers Rush and Hash may have had their suspicions raised by the loose, defaced screws on the door panel. These suspicions might have been enough to warrant further investigation. Cf. Garcia, supra. Whether further investigation might have led to probable cause to search inside the door is merely conjecture. We do not propose here to announce just what steps the officers might have taken to investigate further. We merely hold that, at the point the

search extended behind the door panel, probable cause was lacking and the officers conducted an unreasonable search beyond the scope of defendant's consent, in violation of the fourth amendment. The trial court therefore erred in denying defendant's motion to suppress the evidence discovered during that search.[8]

---

8. Because we find that the search exceeded the scope of the consent and was not backed by probable cause, we did not address whether defendant's consent was invalid because, as he argues, the officers exceeded the scope of the traffic stop by keeping him for an inordinate length of time. We similarly need not determine whether the trial court erred in not severing the trials of defendant and his passenger or in the admission of evidence of which defendant complains.

The conviction is reversed and the case is remanded with directions to grant the defendant's motion to suppress.

EINO M. JACOBSON, Presiding Judge

CONCURRING:

JOHN L. CLABORNE, Judge

JEFFERSON L. LANKFORD, Judge

Supreme Court

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NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

November 5, 1992

RE: **STATE OF ARIZONA vs. RONALD SWANSON**
Supreme Court No. CR-92-0218-PR
Court of Appeals No. 1 CA-CR 90-1404
Navajo County No. 89-CR-523

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 3, 1992, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Martone voted to grant the Petition for Review.

Record returned to the Court of Appeals, Division One, Phoenix, this 5th day of November, 1992.

NOEL K. DESSAINT, Clerk

TO: Hon. Grant Woods, Attorney General - ATTN: Paul J. McMurdie, Esq., and Daniel J. Kiley, Esq.

A. Michael Espino, Esq., Navajo County Public Defender - ATTN: Diana M. Squires, Esq.

Ronald Swanson, Pro Se, ADOC #81277

Glen Clark, Clerk, Court of Appeals, Division One, Phoenix

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NO. 92-1371

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF ARIZONA,

Petitioner,

v.

RONALD SWANSON,

Respondent.

Petition for Writ of Certiorari
to the Arizona Court of Appeals

BRIEF IN OPPOSITION

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EDITOR'S NOTE

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STATEMENT OF THE CASE

As his Statement of the Case, Respondent adopts the "FACTS AND PROCEDURAL HISTORY" section of the opinion of the Arizona Court of Appeals, Petition Appendix at A-2 through A-6. Petitioner's Statement of the Case, Petition at 4 through 10, adds details to the appellate court's statement of facts, which were not relied upon by that Court in forming its opinion.

To summarize, the Court of Appeals held that:

a. The officers had lawful reason to stop Respondent's car, Petition Appendix at A-8 through A-10.

b. The trial court's finding that Respondent voluntarily consented to the search was not clearly erroneous,

Petition Appendix at A-10 and A-11.

c. The trial court's finding that the search exceeded the scope of that consent when the officers invaded the internal structure of the car was factually supported, Petition Appendix at A-11 through A-16.

d. The State conceded that when they commenced the search, the officers had no probable cause to believe the car contained evidence of criminal activity, Petition Appendix at A-16.

e. The trial court's finding that the officers had a "reasonable basis" to extend the search beyond the scope of consent applied the wrong standard for such questions, for a warrantless search must be supported by probable cause in order to be lawful, Petition Appendix at A-16 through A-18.

f. It was necessary then that the Court of Appeals examine the record to determine whether the extension of the search could be factually supported by a finding of probable cause, Petition Appendix at A-18 and A-19.

SUMMARY OF THE ARGUMENTS PRESENTED

Upon its review of the evidence and the law applicable to the question, the Arizona Court of Appeals held that application of the correct, "probable cause" standard required a finding that the officers lacked the requisite probable cause needed to justify their extension of the search beyond the scope of the consent given, Petition Appendix at A-19 through A-29. Its opinion is entirely consistent with Florida v.

Jimeno, ___ U.S. ___, 111 S.Ct. 1801, ___ L.Ed.2d ___ (1991), United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990), and the Arizona and other federal cases it cites. The exigencies which create the automobile and consent exceptions to the warrant requirement of U.S. Const. Amends. IV and XIV are carefully and narrowly tailored to the modifier therein that protects the "right of the people to be secure . . . against unreasonable searches and seizures . . . ." Here, the Arizona Court of Appeals has applied the correct rule of law to the facts before it. Petitioner seeks by its Petition that this Court overthrow the rule of probable cause and create a bright-line rule that it is always reasonable for police in a consent search to invade the structural integrity of the vehicle.

This Court has avoided bright-line rules in Fourth Amendment cases in the past and, in keeping with Jimeno, should continue to uphold the rule of fact-based "reasonableness."

REASONS FOR DISALLOWANCE OF THE WRIT

I. THE ARIZONA COURT OF APPEALS HAS CORRECTLY APPLIED THE REASONABLENESS STANDARD OF Florida v. Jimeno TO THE FACTS OF THIS CASE.

The Arizona Court of Appeals stated that it had reviewed the evidence of the case, Petition Appendix at A-10. Its opinion discusses the relevant facts at length. It had before it the suppression hearing and jury trial transcripts; it weighed all carefully in exercising its authority as a reviewing court; and it

correctly concluded that the trial court had applied the wrong standard to the extension of the search beyond the consent given.

The issue in Florida v. Jimeno was whether the consent to search the interior of an automobile included opening a closed paper bag located within the car. The Court applied a standard of "objective reasonableness" as to whether the consent included the paper bag, and described its question as "what would the typical reasonable person have understood by the exchange between the officer and the suspect? . . . whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car." Jimeno, 111 S.Ct. at 1803 - 1804. The

paper bag in Jimeno was in plain view and well within the area reasonably expected to be searched. The structural integrity of the vehicle was not breached.

Both the trial court and the Court of Appeals in our case concluded that it was unreasonable for the officers to believe the consent they had received included searching behind the door panels and thus invading the car's structural integrity. As Petitioner has said, Petition at 16: "Consent to search one's vehicle would not ordinarily include consent to the removal of the door panels." The trial court however found that the officers had a "reasonable basis" to remove the door panels that arose from their observations during the search, based upon their experience and training, Petition Appendix at A-17

through A-18. This finding was not based upon any claim by the officers as to their understanding of the exchange between Respondent and them at the time of consent.

On review, the Court of Appeals held that the trial court had used the wrong standard; it then applied the correct "probable cause" standard to the same facts which the trial court had found to provide a "reasonable basis" for extending the search, and concluded that these facts did not rise to the level of probable cause which would permit that extension beyond the scope of the consent given. The Court of Appeals noted that the officers had not testified to any connection between their own experience and their assertion of the "common knowledge" that led them to remove the

panel, Petition Appendix at A-17 n.6.

In describing its understanding of the applicability of Jimeno to our facts, the Court of Appeals said, Petition Appendix at A-15 n.5: "In Jimeno, the Supreme Court held that a general consent to search the car for narcotics included consent to search a paper bag lying on its floor. We do not believe, however, that the typical reasonable person would find that consent to 'take a look in the car' for drugs, weapons, or large sums of money included consent to dismantle the car in the process." Petitioner appears to agree. Petition at 16.

II. THE CASE OF United States v. Garcia, CITED AT LENGTH BY THE COURT OF APPEALS, CORRECTLY APPLIES THE RULE IN Florida v. Jimeno.

The appellate opinion discussed the Garcia case at length, Petition Appendix at A-12 and A-13, A-26 through A-28. The Garcia court held that the officers exceeded the scope of the consent given when they went behind the door panel, a part of a car "not normally included in this set of areas to be searched" because that action is "inherently invasive", Garcia, 897 F.2d at 1419 - 1420. As to this holding Garcia presages the Jimeno "objective reasonableness" rule. The fruits of the search extension were admissible in Garcia because the officers had developed probable cause to go beyond the door panel when they had seen from above through the window hole that there were packages behind the door. In terms of Jimeno, it was reasonable in Garcia under the consent they had been given for

the officers to look down through the window hole to see if anything were inside the door, but it was unreasonable just to proceed to open the panel.

In our case, the State has conceded that at the beginning of the search, the officers lacked probable cause to believe the car contained evidence of criminal activity. Petition Appendix at A-16. The Court of Appeals' review of the evidence led it to conclude that the officers' suspicions of something behind the door never rose to the level of probable cause -- that the officers never developed any further investigation before they opened the door panel (such as first looking down through the window hole), and the reviewing court could not reasonably say that probable cause existed to permit a further search.

III. MOST OF THE CASES CITED BY PETITIONER ARE NOT APPOSITE TO THE FACTUAL SITUATION OF THIS CASE.

The cases cited by Petitioner easily separate into four categories which demonstrate their inapplicability here. Of these cases only Garcia, United States v. Espinosa, 782 F.2d 888 (10th Cir. 1986), and Ragin v. State, 192 Ga. App. 686, 385 S.E.2d 770 (1989), were cited by Petitioner to the Arizona appellate courts.

A. In the first group of cases, the defendant consented and actively participated in the search. In such situation, a defendant cannot later say that there was an "objective" failure to communicate with the officer under Jimeno about the extent of the search, since he had participated in it. This group

includes United States v. Gutierrez-Mederos, 965 F.2d 800 (9th Cir. 1992) (a post-Jimeno case; driver opened hatchback for officer, and gave him the keys); United States v. Pena, 920 F.2d 1509 (10th Cir. 1990) (driver opened trunk with his own screwdriver; he then opened his suitcase for officer to inspect); People v. Crenshaw, 9 Cal. App. 4th 1403, 12 Cal. Rptr. 2d 172 (App. 1992) (a post-Jimeno case; driver opened car doors and trunk, then delivered keys to officer; driver was then arrested on warrant; officer continued search after arrest); Ragin v. State (driver denied car was his, thus had no standing to object to search; driver unlocked trunk for officers); and State v. Valencia Olaya, 105 N.M. 690, 736 P.2d 495 (App. 1987) (driver opened trunk for officer and

specifically consented to search of luggage, glove box, and interior of car). In our case, the driver and passenger did not participate in the search, Petition Appendix at A-5.

B. In the second group, the defendant signed a form, consenting to a complete search. See United States v. Blanco, 844 F.2d 344 (6th Cir. 1988), cert. denied, 486 U.S. 1046, 108 S.Ct. 2042 (1988); United States v. Torres, 663 F.2d 1019 (10th Cir. 1981); and State v. Santana, 215 N.J. Super. 63, 521 A.2d 346 (A.D. 1987). Again, in terms of Jimeno, it is reasonable to understand that permission to conduct a complete search will result in a thorough one, and these appellate courts so construe "complete." Respondent in our case specifically declined to sign such a consent form,

Petition Appendix at A-4, and A-13 through A-15.

C. In the next group of one case, United States v. Espinosa, the defendant was subjected to the "functional equivalent of a border search," for which the protections of the Fourth Amendment are arguably lessened. See United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), cited in Espinosa. The driver in Espinosa had been stopped at a permanent Border Patrol checkpoint near Las Cruces, NM; the officer's suspicions were initially aroused by the driver's hesitant, incomplete answers to otherwise innocuous questions. The reviewing court held that the trial court finding of reasonableness in the parties' understanding of the consent given (per Jimeno) was not

clearly erroneous. There is a contrary position, however: see United States v. Reed, 882 F.2d 147 (5th Cir. 1989) (officers at border patrol checkpoint still need probable cause to search). No such border-equivalency occurred in our case. The trial court and the Court of Appeals found that the extent of the search clearly exceeded the scope of the consent given; the reviewing court held the proper standard for extension of the search (per Garcia) to be probable cause.

D. Finally, there are the two cases cited by Petitioner in which the reviewing court applied the standard of probable cause to determine whether the extension of the search beyond the consent given was permissible. See United States V. Lugo, 978 F.2d 631 (10th Cir. 1992) (a post-Jimeno case which does

not discuss that rule: an otherwise unjustifiable warrantless search would have been upheld, had the officers relied upon probable cause, but the court found that their testimony omitted the crucial facts needed to support such a finding); and United States v. Garcia (officers looked through window hole and saw packages behind door). The Arizona Court of Appeals applied this correct standard to the facts of our case and found that it had not been met.

IV. PETITIONER MISREADS THE COURT OF APPEALS OPINION.

As noted above, the Arizona Court of Appeals followed the Garcia decision because it stated the correct, "probable cause" standard that also pertains as to Arizona searches, Petition Appendix at A-

18 and A-19, A-26 through A-28. In its discussion, the Court of Appeals cited State v. Richards, 110 Ariz. 290, 518 P.2d 113 (1974), for the rule, based upon former Ariz. Rev. Stats. Sec. 13-1403, now ARS Sec. 13-3883, that probable cause is necessary in order to justify a warrantless search. In citing Garcia and Richards, the Court of Appeals is clearly saying that once the officers decide to exceed the scope of the consent they have been given, the fruits of that search extension are suppressible unless probable cause exists. The Court of Appeals also cited State v. Acosta, 166 Ariz. 254, 801 P.2d 489 (App. 1990), on this issue, but in it there is the added difference that the driver there had not consented to the search. The Court of Appeals also cited another Arizona case,

State v. Houpt, 169 Ariz. 550, 821 P.2d 211 (App. 1991), in its discussion of why suspicion, whether reasonable or not, needs more factual basis before it rises to the level of probable cause.

Petitioner also misreads the appellate opinion as to a factual matter. It misquotes the Court of Appeals by saying that the Court found the officers' arousal of their suspicions to be reasonable, Petition at 18. What the Court actually said was very different, Petition Appendix at A-28:

a. that the officers may have had their suspicions raised about the door panels;

b. that such raised suspicions might have been enough to warrant further investigation; but

c. to inquire further as to what

further investigation might have led to probable cause is "merely conjecture."

CONCLUSION

No interest is served by granting the Petition for Writ of Certiorari. The factual record is clear and concise and supports the decision of the Arizona Court of Appeals. The Jimeno rule is a fact-based standard which the Court of Appeals has correctly applied to the facts before it. Furthermore, the Arizona Court of Appeals correctly applied the standard of probable cause for warrantless searches to that extension of the search beyond the scope of the consent given. The appellate order to suppress evidence in Respondent's case was appropriate and

should not be set aside. Petitioner's efforts here to overthrow the rule of probable cause should be avoided, in keeping with Florida v. Jimeno.

RESPECTFULLY SUBMITTED,

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